

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

## ORDER

Defendant seeks to suppress any in-court identification where the prospective witness has previously been unable to identify him from a photo array. Because the courtroom scenario cannot be predicted, and the trial judge will have discretion to protect defendant against visually suggestive courtroom arrangements, the motion will be denied.

As pointed out in an Eighth Circuit opinion, there are many situations in which courtroom identification should have little or no probative value because “an identifying witness’ knowledge that the sole defendant is the person charged with the offense is in itself highly suggestive.” United States v. Robinson, 782 F.2d 128, 131 n. 3 (8<sup>th</sup> Cir. 1986). Such suggestive seating, and even leading questions about the defendant, may be nonprejudicial, when all circumstances are considered. *Id.*

More recently the Court has held that the trial judge has discretion to allow identification from normal courtroom seating, leaving the reliability of identification to the jury. United States v. Davis, 103 F.3d 660, 671 (8<sup>th</sup> Cir. 1996). This was in a case, however, where the witness had previously identified the defendant in a pretrial lineup.

In another case there was no error where there was nothing suggestive in the seating, in that all defendants and counsel were male caucasians. United States v. Kime, 99 F.3d 870 (8<sup>th</sup> Cir. 1996).

The combination of a failure to make a pretrial identification and what may be suggestive seating here is troubling, but neither side offers pertinent citations. It may be that the trial judge, who may or may not be me, would determine that special efforts should be made to avoid suggestive seating. The request should be addressed to the trial judge.

The defendant's motion in limine is therefore DENIED.

/s/ Howard F. Sachs  
HOWARD F. SACHS  
UNITED STATES DISTRICT JUDGE

March 2, 2006

Kansas City, Missouri